No. 82-6106

IN THE

SUPREME COURT OF THE UNITED STATES

MACK ARTHUR KING

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSISSIPPI

PETITIONER'S REPLY BRIEF

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Petitioner MACK ARTHUR KING, through undersigned counsel, submits the following reply to the respondent's opposition to the petition for a writ of certiorari.

ARGUMENT

Respondent's principal argument with respect to the first two points raised in the petition [1] is that the issues were not raised below, and therefore this Court lacks jurisdiction to decide those issues. The respondent's position, of course, is meritless.

First, the Mississippi Supreme Court raised sua sponte the second issue presented in the petition, whether the

[1] As to the third issue, petitioner's arguments are fully set forth in the petition. Respondent has offered nothing that would undercut the petitioner's arguments.

sentencing court was required to instruct the jurors that they had the option to sentence the defendant to life imprisonment regardless of the relative weight of the aggravating circumstances and mitigating circumstances. Specifically, the Mississippi Supreme Court on June 30, 1982 asked the parties to brief the following question (Appendix C to Petition, at 1) (emphasis in original):

> Should the instruction have included directions to the jury that if it found the aggravating circumstances outweighed the mitigating circumstances the jury might impose the death sentence, but if the jury finds that the mitigating circumstances outweighed the aggravating circumstances, it should not impose the death sentence?

In responding to this request, the petitioner argued to the Mississippi Supreme Court that the sentencing jury erroneously "was not informed of its option to sentence the appellants to life imprisonment," and that this error violated the rule in Mississippi requiring that the sentencing jury have such discretion. Appellant's Resp. To Supp. Brief By Appellee, 7/21/82, at 6. Petitioner further argued that the "option to sentence to life imprisonment" was required by this Court's rulings in Lockett v. Ohio, 438 U.S. 586 (1978), and Bell v. Ohio, 438 U.S. 637 (1978). Specifically, petitioner argued as follows (Id. at 9-10):

> In addition to the Washington holding outlined above, the Fifth Circuit has expressed an opinion that holdings in the cases of Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); and Bell v. Ohio, 438 U.S. 637, 98 S.Ct. 2977, 57 L.Ed.2d 1010 (1978), mandates that a trial court must clearly instruct a sentencing jury about not only mitigating circumstances, but also the jury's option to recommend against the death penalty. Chenault v. Stynchcombe, 581 F.2d 44 (1978).
>
> The holdings of Lockett and Bell establish clearly that the jury may not be precluded from consideration of any factor that might be construed as mitigating circumstances in favor of the defendant.

> Interpretation of these cases by the Fifth Circuit have direct application to the Mississippi statute by requiring that any sentencing jury be clearly and unequivocally informed of the sentencing jury's right to impose the life sentence without respect to the severity of aggravating circumstances present in any given case.

Finally, one of the two dissenting opinions to the Mississippi Supreme Court's decision discussed this issue at length. See Appendix A to Petition, Hawkins and Patterson, JJ., dissenting. Clearly, the issue has been presented to and decided by the state court, and is properly presented to this Court for review.

Notably, the respondent has presented no argument or response with respect to the merits of this issue, presumably because there is no defense to the petitioner's complaint. The instruction clearly violates federal constitutional and state law for a variety of reasons, as set forth in the petition. Accordingly, this Court should grant certiorari on the second issue, summarily reverse the decision of the Mississippi Supreme Court insofar as it affirms the sentence of death, and remand for resentencing consistent with the principles set forth in Lockett v. Ohio, Bell v. Ohio, Woodson v. North Carolina, 428 U.S. 280 (1976), Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982), Sprivey v. Zant, 661 F.2d 464 (5th Cir. 1981), cert. denied, ___ U.S. ___, 102 S.Ct. 3495 (1982), and Chenault v. Stynchcombe, 581 F.2d 444 (5th Cir. 1978).

Second, this Court clearly has the discretion to review petitioner's first issue, whether the "especially heinous, atrocious or cruel" aggravating circumstance was unconstitutionally applied in this case. As we stated in our petition, this issue was not expressly raised by the petitioner in the state court. However, in the state court's wide-ranging review of potential errors in the trial court, it specifically referred to the issue in Godfrey v. Georgia, 446 U.S. 420 (1980), which is

substantially the same as the issue presented here. See Appendix A to Petition, at 17. Moreover, as we demonstrated in our petition, the Mississippi Supreme Court's application of the "especially heinous, atrocious or cruel" aggravating circumstance in this case and in all capital cases it has reviewed, is so grossly deficient as to constitute plain error. 2/ This Court long has held that it has discretion to review issues, and even to raise issues sua sponte that were not raised below. See Wood v. Georgia, 450 U.S. 261, 264-65 (1981) (raising issue sua sponte); Vachon v. New Hampshire, 414 U.S. 478, 479 & n.3 (1974) (citing cases). This Court's decision in Webb v. Webb, 451 U.S. 493 (1981), relied upon heavily by the respondent, did not depart or detract from this discretion. 451 U.S. at 502 (Powell and Brennan, JJ., concurring). Indeed, after Webb was decided, this Court raised an issue sua sponte in a capital punishment case, and decided the case on that issue, relying on the principles of Wood v. Georgia and Vachon v. New Hampshire. See Eddings v. Oklahoma, 455 U.S. 104 (1982). Therefore, this Court has the jurisdiction and the discretion to review petitioner's first issue.

2/ The respondent's opposition strongly confirms this fact, admitting that the Mississippi Supreme Court has never directly defined this aggravating circumstance. Opp. at 9. At best, the respondent can only point to various cryptic characterizations that have been used by the Mississippi Supreme Court to describe some of the killings: "wanton, willful, useless and cruel", "brutish", "brutal", "senseless" and "unprovoked." Opp. at 9. These scattershot adjectives, which appear only randomly through the Mississippi Supreme Court's decisions, are themselves hopelessly vague and overbroad. Together they provide no meaningful standard for application of the aggravating circumstance. Scattered and isolated as they are in the state court opinions, they are useless to any reasoned attempt to apply the "especially heinous, atrocious and cruel" aggravating circumstance.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of April, 1983, I caused a copy of Petitioner's Reply Brief to be served by first class mail, postage prepaid, on counsel for respondent, as follows:

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